

OPINION
53-47

June 11, 1953 (OPINION)

HIGHWAYS

RE: Bridges - Yellowstone River Bridge

This is in reply to your letter of June 4, 1953. You state that the Board of County Commissioners of McKenzie County wish to know what legal action can be taken to build the Yellowstone River Bridge near Fairview, immediately.

It is our opinion that the best available remedy is to seek a writ of mandamus compelling the State Highway Commissioner to "proceed with the preparation of plans and specifications and to take such other action as may be necessary in the construction and completion of such bridge." (Chapter 34, S.L. 1949).

It is this course of action which the Commissioner was "authorized and directed" to take, by chapter 34, Session Laws of 1949. That chapter made an appropriation to effectuate this and House Bill No. 732 passed by the 1953 Legislature made a further appropriation. Although, as we said in our opinion to you dated April 24, 1953, there scarcely is needed more confirmation as to the intended mandate given the Commissioner by the Legislature. The 1953 Legislature passed a resolution further explaining that intent by saying in part:

"That it is the spirit and intent of this assembly to authorize and direct the state highway commissioner to use such funds as are now or may become available for such construction." (Senate Concurrent Resolution J, 1953 Legislative Assembly).

As to the question of whether or not the highway commissioner is now and has been complying with this legislative mandate, now four years in effect, that is a question of fact upon which we are not passing. Should he not be so complying, then mandamus is the proper remedy.

Application for a writ of mandamus is governed by the provisions of chapter 32-34 of the North Dakota Revised Code of 1943.

With respect to the possibility of using writ of mandamus to compel a public official to proceed with the construction of a bridge, it is the general rule of law that:

"The performance of a duty of public officials to consider the propriety of erecting a bridge, and a mandatory duty to purchase or erect a bridge may be enforced by mandamus." (55 C.J.S. 344)

In this case, there is no room for discretion as to propriety, it is a mandatory duty under the law, hence the applicable language is that underlined.

As to the appropriateness, it is further said:

"Mandamus * * * is an appropriate remedy to enforce a specific duty with respect tot he erection of a bridge, where it is imposed by law, and no discretion is vested in the board." (Ibid.) For "board" here, read "highway commissioner."

Another stating of the applicable rule is:

"The discretion vested in public officers as to the improvement or repair of bridges, viaducts, etc., will not be interfered with by mandamus. But where the duty to erect, repair, or improve, such structures is clearly imposed by law and is ministerial rather than discretionary

in character, its performance may be enforced by the courts through their mandatory process." (34 Am.Jur. 969)

Speaking more generally of public works, it is the rule that:

"Mandamus will not lie to control public officers or boards in the exercise of the discretion vested in them as to public improvements and the necessity and character of the same, although it is an available remedy to enforce performance of plain, imperative duties as to such matters, where no other adequate remedy is available." (Ibid)

There remains the crucial question as to whether the Commissioner has any discretion in the matter. In fact he has no discretion. Not only is he "authorized and directed" but the specific location of the bridge is given as being across the Yellowstone River in McKenzie County, North Dakota, on Highway 23 in said McKenzie County, North Dakota.

The meaning of the words "authorized and directed" in a statute is clear either to laymen or lawyer. "Direct" means to "order" or "command." (Black's Law Dictionary, 3d Ed.) Used in combination, the two words are invariably interpreted as in the decision here cited:

"Laws 1892, c. 481, Par. 12, providing that the proper officers of the City of Brooklyn are authorized and directed to issue water bonds sufficient to pay the award in condemnation proceedings, means that the officers are ordered and has the same force as an order given a soldier whose only answer is obedience." (People v. Guggenheimer, 59 NYS 913)

There is no discretion to be exercised by the Highway Commissioner. Questions as to feasibility, desirability, relative need with reference to other projects, technical or engineering objections which he may have by virtue of his position have no bearing on the issue. Lack of funds to proceed would be material, but the Legislatures of 1949 and 1953 have provided him with funds which can only be used for this purpose, as we stated in our opinion of April twenty-fourth referred to.

For the commissioner to proceed as directed by the law cited, is a ministerial duty, being one which he must perform in a prescribed manner, in obedience to the mandate of legal authority, without the regard to or the exercise of his own judgment upon the propriety of the act being done. It is an act in respect to which there is no discretion.

There is herewith attached a copy of the opinion dealing with this bridge, written to you on April 24, 1953, since it has been referred to herein in several places.

ELMO T. CHRISTIANSON
Attorney General